No. 90-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE

The National Labor Relations Board issued its decision and order finding the Company had violated Section 8(a)(1) and (5) of the National Labor Relations Act by laying off 10 employees who had worked in a shutdown operation without first bargaining with the Union over the decision to lay off the employees. The Board also found the Company had violated the same provisions of the Act by declining to arbitrate the Union's grievances over the layoffs, a "blanket" repudiation of the arbitration provision of a labor agreement which had expired 11 months before the layoffs, said the Board. However, because the Board found the layoff grievances did not

"arise" under the expired agreement, it declined to order the Company to arbitrate the grievances.

Upon review, the Court of Appeals enforced the Board's order, except it reversed the Board's conclusion the grievances did not "arise" under the expired agreement. In its brief opposing the petition for certiorari, obviously, the Board opposes the granting of the petition with respect to those portions of the decision and order enforced by the Board. However, the Board does not even rise to the defense of its own decision and order with respect to the portion reversed by the Court.

ARGUMENT

1. No one contends the decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) did not cover both the decision to cease operating part of a business *and* the consequent layoff of the employees involved in the shutdown operation. But, in effect, the Board has decided to adopt only part of *First National Maintenance Corp.* (dealing with the decision to shut down) while rejecting part (dealing with the consequent decision to lay off the employees working in the shutdown operation). If this is possible, *First National Maintenance Corp.* does not achieve its stated goal of conferring on management the ability to act with speed and flexibility, free from the uncertainty of legal challenges to its actions which might not be resolved for years. In its brief, the Board emphasizes "the available alternatives" to the layoffs which the Company and Union would have "bargained about." Brief, p. 8. Aside from the fact this precise argument was raised by this Court in *First National Maintenance Corp.*, and was flatly rejected, the Board's argument is self-defeating.

Why? Because, if bargaining over the consequent layoffs is mandatory, the Board's rules on "impasse" and a union's "right to relevant information" guarantee there can be no speed or flexibility in making management decisions; there can be no freedom from the fear and uncertainty that some Court, somewhere, 10 years later, will say to an employer, "You didn't bargain to a good-faith impasse, you didn't give the union the relevant information it requested."

The Company bargains in bad faith, and thus violates Section 8(a)(1) and (5) of the Act, if it unilaterally alters terms and conditions of employment before first reaching a good-faith impasse with the Union, says the Board. Brief, p. 11. A genuine impasse exists when there is no realistic prospect that continued discussions would be fruitful, but "even parties who seem to be in implacable conflict may, by meeting and discussion, forge first small links and then strong bonds of agreement." *AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968). Further, "[T]he issue of the existence of an impasse 'is a question of fact peculiarly suited to the Board's expertise.' " *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 65 (2nd Cir. 1979). It is virtually impossible to reach a genuine impasse as long as a union remains anxious to meet, to discuss, to ask questions about the employer's position, to argue against it, to present new "alternatives," to request information, to ask questions about that information, to ask for more information, and then to reexplore everything which has already been covered. An employer never knows if a good-faith impasse has been reached until the Board says so and the last avenue of appeal has been exhausted . . . and that could take a decade.

In *First National Maintenance Corp.*, this Court was concerned that labeling a decision as "mandatory could

afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose." 452 U.S. at 683. Yet, the Board's rules on providing information are a "trap," for even the most experienced labor lawyers. Indeed, the United Autoworkers Union has issued a manual explaining how unions can use requests for information to delay and thwart an employer's decisions. The manual is entitled *Strategies Against Shutdowns: A UAW Plant Closing Manual* and is part of the record reviewed in *National Metalcrafters, Inc.*, 276 NLRB 90 (1985), so the Board is aware of a union strategy to use the Board's rules on providing information as a tool for delay and thwarting management decisions. An example of the use of this "tool" to delay can be seen in the Union's request for information after the Board issued its decision in this case. See addendum.

The Board view of *First National Maintenance Corp.* places an employer desiring to shut down an operation for legitimate reasons in an untenable position. It may be losing substantial amounts of money on the operation because of an obsolete plant and equipment or, perhaps, the market for the product has simply disappeared. What is the employer to do? Shut down the operation and keep employees on the payroll with nothing to do while it bargains for months with a union bent on delay? Keep producing products at a loss or for which there are no customers while a union drags negotiations on indefinitely, according to the manual? Go ahead and lay off employees and risk the chance of a big back-pay award 10 years later?

Petitioner submits this is not what this Court had in mind when it spoke of mangement's "need for unencumbered decisionmaking." The Board's approach

requiring that every case involving a partial shutdown has to be decided by the Board and all avenues of appeal exhausted on the issue of bargaining over the consequent layoff of employees before there can be any legal certainty simply will not work. The Board simply has not accepted the fact that it lost in *First National Maintenance Corp.*; and in this and other cases, it is seeking to evade or emasculate the holding in that case.

2. The Board contends the fact the grievance in this case arose almost one year after the expiration of the arbitration agreement and the fact the no-strike clause in the labor contract was specifically limited to the term of the contract are "insubstantial" distinctions. Brief, p. 9. Petitioner submits more than 11 months is not an "insubstantial" period of time, and it is not an "insubstantial" matter that the Board says the Company must arbitrate grievances over which the Union may strike.

The Board concedes "the courts of appeals are divided over the test *Nolde* sets forth for determining the arbitrability of post-contract termination grievances." Brief, p. 10. But, says the Board, that makes no difference here because those conflicting decisions involved Section 301 of the LMRA, while this case involves Section 8(a)(5) of the NLRA. But in its decision in this case, the Board relied on *Nolde*, so the argument of the Board in its brief that *Nolde* has no application here simply holds no water. If the Board relies on *Nolde*, a Section 301 suit, to support its decision and order in this case, a Section 8(a)(5) suit, and the Courts of Appeals are divided on *Nolde*, then its seems obvious this Court should grant the petition for certiorari and create some clarity out of the confusion.

On the other hand, if the Board's argument that *Nolde* is not applicable in a Section 8(a)(5) case has merit, the Board decision and order in this case has no foundation.

In effect, the Board itself has withdrawn the very foundation upon which it based it decision in this case. Without *Nolde* to support its decision, the Board has only Section 8(a)(5) upon which to rely, and that section is circumscribed by Section 8(d), which specifically defines the obligation to bargain. If anyone can point to any language in Section 8(d) which includes the obligation to arbitrate post-contract termination grievances, they should do so, because Congress never put it in there.

As a way out of this dilemma, the Board, in its brief, attempts to fall back on the argument an employer violates Section 8(a)(5) of the Act if it makes changes in existing terms and conditions of employment without first bargaining to an impasse with the union after the expiration of an agreement. Brief, p. 11. But the Board, *in its decision,* did not advance this theory. It is the Board and Court of Appeals decision which petitioner seeks to have reviewed, not Board Counsel's post hoc rationalizations. Indeed, in its decision, the Board expressly reaffirmed that "the arbitration commitment arises solely from mutal consent and that Congress did not intend the National Labor Relations Act to operate to create a statutory duty to arbitrate." 286 NLRB No. 79 (Petition Appendix B5). Board Counsel cannot have it both ways, arguing in his brief, as he does, that Section 8(a)(5) imposes an obligation to arbitrate post-contract termination grievances, while the Board, in its decision, argues that the obligation to arbitrate such grievances is purely consensual and does not arise from the Act.

In any event, this Court has long held that arbitration is purely a matter of mutual consent. *See Nolde Bros., Inc. v. Bakery Workers,* 430 U.S. 243, 250. If there is an obligation to arbitrate a post-contract termination grievance, it is based on mutual consent and not this

"unilateral change of working conditions" theory now articulated for the first time in Board Counsel's brief. This deficiency in Board Counsel's theory is clearly pointed out by Justice Stewart and [then] Justice Rehnquist in the dissenting opinion in *Nolde Bros.,* 430 U.S. 243 at 257.

The petition should be granted.

Dated: November 12, 1990

Respectfully submitted,

M. J. DIEDERICH

Attorney for Petitioner
Litton Financial Printing Division,
a Division of Litton Business
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APPENDIX A

LAW OFFICES
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December 4, 1987

M.J. Diederich, Esq.
Litton Corporation
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Beverly Hills, CA 90210-4867

RE: Litton Financial Printing Division v. Printing Specialties and Paper Productss [*sic*] Union, et al.
NLRB Case No. 32-CA-3160

Dear Mr. Diederich:

The union believes that it would be appropriate to meet with you to discuss the layoffs. In preparation for the meeting, we need you to provide the following information. We will need that information in sufficient time to review it with the affected employees. The information needed is described below.

We suggest a meeting in the Bay Area and please let me know specifically when you would like to have that meeting. The union would also prefer to process the grievances and believe it would be appropriate to do so at such a meeting.

The information which the union needs (for both purposes of bargaining as well as processing the grievances) is the name of each worker who continued working after

the layoffs in 1980. We need to know the amount of hours worked each week until the plant closed. In addition, we need to know the kind of work performed by each employee during each of those weeks in which he or she worked. In addition, the union will need to examine production records to determine the kind of work which was done. Finally, the union needs to examine the personnel files of each of the employees involved.

Sincerely,

/s/ David A. Rosenfeld

DAVID A. ROSENFELD

DAR/jlb
opeiu 3 afl-cio(1)